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No. ——

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

S. REBECCA DACHMAN, M.D.,
Petitioner,

v.

WILLIAM DAVID SCHWIETERMAN
and UNITED STATES OF AMERICA,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. As a matter of law is the filing of a criminal complaint under the "scope of employment" of a supervisory non-enforcement, non-judicial/non-investigatory government official?

   a. As a matter of law, is the filing of a criminal complaint, without investigation, under the "scope of employment" of a government official?

   b. Does the lack of an investigation prior to filing charges by a non-enforcement, non-investigatory/non-judicial government official necessitate de novo review of probable cause and discovery when "scope of employment" is challenged in Federal Court?

The Fourth Circuit has stated that the filing of a criminal complaint within the "scope of employment" of a non-judiciary/non-investigatory government official and that "there is no exhaustion requirement . . . for the investigation to finish". This is contrary to applicable state law, FDA regulations, the policies of other federal agencies, the decisions in other circuits and the policies formulated by this Court.

2. Can a non-investigatory/non-judicial government official, whose responsibilities are limited to regulation of specific federal law, file a criminal complaint based on state or county code under the "scope of employment" without statutory authorization or written approval of the U.S. Attorney?

LIST OF PARTIES

Petitioner is S. Rebecca Dachman, M.D.

The respondents in this case are William David Schwieterman, and the United States of America.

RULE 29.6 STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, petitioner, S. Rebecca Dachman, M.D., states she has no parent corporation.

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The judgment of the United States Court of Appeals for the Fourth Circuit in S. Rebecca Dachman, M.D. v. William David Schwieterman is reprinted in Appendix A. The order of the Court denying Petitioner's Petition for Rehearing is reprinted in Appendix C. The order denying reconsideration and transcript of hearing of the District Court denying discovery at hearing is reprinted in Appendices F and D, and the order for substitution of the United States for defendant is reprinted in Appendix B.

JURISDICTION

The judgment of the Court of Appeals was entered on July 23, 1998. The judgment of the Court of Appeals denying Plaintiff's Petition for a Rehearing and Suggestion

for Rehearing In Banc was filed on September 21, 1998. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS

Statutes regarding removal are 28 U.S.C. § 1442(a)(1) and 1446. Statutes regarding substitution are 28 U.S.C. § 1346(b). 28 U.S.C. § 2679(d)(b), reprinted in Appendix Q. Additional relevant statutes are 4 U.S.C.A. and 5 U.S.C.A. 18 U.S.C. § 1001.

INTRODUCTION

The American workplace is a heterogeneous multifaceted environment where interpersonal differences and tensions are usual. This Court has played a significant role in defining the appropriate standards of workplace interactions that safeguard the personal and constitutional rights of employees. Among the issues that has evolved under the guidance of this Court is the concept of "scope of employment" that confers immunity to federal agents involved in tort actions. In its critical 1995 decision in *Gutierrez de Martinez v. Lamagno,* 115 S. Ct. 2227, this Court distinguished between removal to Federal Court under "color of law" and substitution of the United States as a party defendant under "scope of employment". Implicit in the decision was that the two terms are not interchangeable and refer to different relationships between government duties and responsibilities.

In the current case before the Court, Petitioner respectfully requests that this Honorable Court clarify the evolving contours of "scope of employment" certification as it relates to the filing of criminal complaints by government officials.

In the case before the Court a government employee was accused and arrested on a fraudulent criminal charge based on a telephone message, that was filed prior to any

meaningful investigation. The charges which were filed by her supervisor at the FDA, who was not an investigatory or judicial official, was based on county not federal law. The case was nolle prosequi and a subsequent Internal Affairs investigation concluded that the charge was "not substantiated". When Petitioner sued her supervisor in state Court the case was removed to Federal Court, "scope of employment" certification granted and the United States was substituted as party defendant.

The District Court and the Appeals Court upheld certification, which Petitioner vigorously opposed maintaining that filing the complaint was not a "duty" under Maryland law, involved fraud and denial of constitutional rights. The Courts did not allow for discovery or depositions, which Petitioner felt was critical to showing by the preponderance of evidence that filing the criminal complaint was not under the "scope of employment". The lower Courts decisions were contrary to decisions articulated in state law, case law in the circuits and policies expressed by the Supreme Court.

To clarify the confusion that exists regarding the role of non-investigatory/non-judicial officials to initiate, file and direct criminal prosecutions of employees and to define a algorithm of government accountability and attention to due process and liberty rights in filing criminal complaints, Petitioner respectfully requests that the Court grant certiorari.

STATEMENT OF THE CASE

A. Nature of the Case

This is a petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuits entered in this case that affirmed the District Court's Orders denying Plaintiff's Motion for Scope Determination/Request for Discovery/Evidentiary Hearing and Motion for Reconsideration of same granting

the United States' Motion for Substitution and Defendant's Motion to Dismiss for lack of subject matter jurisdiction. Without permitting any discovery or conducting an evidentiary hearing, the District Court erroneously determined that William Schwieterman was acting in the scope of his federal employment when he filed criminal charges against Dr. Dachman before the results of any investigation. In making this determination, the District Court explicitly assumed that William Schwieterman was not authorized to file charges by the FDA or his supervisors and that he had unreasonable animus against Dr. Dachman.

B. Statement of Facts

Dr. Dachman had been employed by the FDA as a medical officer since 1988. Until her arrest in 1994 her evaluations were excellent to outstanding and she was considered an expert in her area. In June 1994, the GUSTO project, and which was the largest clinical trial ever submitted to CBER, FDA, and on which she had been working on for 4 years was unanimously approved for licensure. Shortly thereafter W. Schwieterman, a 2 year veteran of the FDA became her immediate supervisor and began harassing Dr. Dachman over trivial matters. One such matter was an apology he requested she write, after she had already verbally apologized, to a subordinate over a minor issue. On this occasion, Dr. Dachman did not wish to do so, and was nagging him when he precipitously called security. Dr. Dachman quietly complied with security's request to leave but later went back to talk again to W. Schwieterman and ask advice. He once again called security and Dr. Dachman once again left his room quietly. Later that evening the guard advised Dr. Dachman to file a complaint and signed a note for her. Two days later W. Schwieterman stated he received a threatening message over his answering machine and accused Dr. Dachman of leaving the message. Before any investigation was complete (even though the police

had been contacted) and before even asking Dr. Dachman her whereabouts at the time, W. Schwieterman precipitously went to the Commissioner's Office 72 hours after receiving the call, and filed a criminal complaint against Dr. Dachman that contained false material statements including the "precipitating event" for the call. Based on such complaint, and despite Dr. Dachman's assertion to superiors that she could prove her innocence (and her statement to police that she was in someone's room at the time of the call and was being framed) once she had been notified by police of the accusation, Dr. Dachman was arrested 4 days later. She was subsequently subjected to multiple disciplinary actions until her removal from Federal service in February 1998. Of note, the charges against Dr. Dachman were *nolle prosequi* in December 1994 (there was some delay because the tape was not turned over to the prosecutor for 3 months) and a subsequent Internal Affairs investigation indicated that the charges against her were not substantiated.

As a matter of law, Dr. Dachman contends that W. Schweiterman, a physician whose responsibilities were limited to clinical trial design, was furthering his own personal interest, not any government interest, when he initiated and pressed charges against Dr. Dachman and that his contention that he was concerned about his workplace safety was a guise. Under Maryland law, he could not have been acting within the scope of his employment since his motives were personal, filing a criminal complaint was not a standard duty of his, and his supervisors had no control over his actions at the time.

In this petition, Dr. Dachman respectfully requests this Honorable Court to reverse the decisions and orders of the lower Courts and rule that (1) filing a criminal complaint by a non-investigatory/non-judicial federal official is never within the scope of employment, (2) filing criminal charges based on state or county law is not within the scope of employment unless authorized by the U.S.

attorney in writing, and (3) when issues of controverted testimony, fraud and constitutional rights are raised, discovery is critical.

C. Procedural History

The facts of this case arise under 28 U.S.C. §§ 1442, 1446, § 1346 and § 2679. 28 U.S.C. §§ 1442 and 1446 remove a suit to federal court if the actions were under the "color of law". 28 U.S.C. §§ 1346 and 2679 substitute the United States as party defendants if the actions are found to be under the "scope of employment". On February 26, 1996 Dr. Dachman filed a three count complaint against W. Schwieterman in the Circuit Court for Montgomery County, Md., alleging malicious prosecution, negligence and abuse of process. On April 4, 1996 the complaint was amended to include a claim for violation of Maryland Declaration of Rights.

On April 22, 1996 the U.S. Attorney for the District of Maryland filed a Petition of Removal accompanied by scope of employment certification and moved that the United States be substituted as the party defendant. The certification was issued before review of the litigation report. On May 8, 1996 Dr. Dachman opposed the motion for substitution by way of a Motion for Judicial Scope of Employment Determination, challenged the certification, and requested discovery, stating that W. Schwieterman was only furthering his own interests when he pursued criminal charges, not any government interest. In her affidavit Dr. Dachman indicated that the duties given to medical officers did not include filing criminal charges. In Dr. Dachman's reply to Defendant's opposition Dr. Dachman indicated that there was controverted testimony. The court denied Dr. Dachman's Motion for Scope of Employment Determination/Request for Discovery/Evidentiary Hearing and stated "[e]ven if it could be established that defendant had unreasonable animus against Plaintiff, his actions in contacting the police would

still be, objectively speaking, sufficiently employment related." On July 3, 1996 the United States moved to dismiss Dr. Dachman's complaint for lack of subject matter jurisdiction. On July 12, 1996 Dr. Dachman filed a Motion for Reconsideration and opposed the Motion to Dismiss. Dr. Dachman argued that the issue was not contacting the police but whether W. Schweiterman, a government physician whose responsibilities are limited to clinical trial design and analysis, acted within the scope of employment as defined by Maryland law when he swore out criminal charges resulting in Dr. Dauchman's arrest and prosecution, and in doing so failed to await the outcome of either the police or the government agency investigation, disregarded applicable FDA regulations, polices and procedures and motivated by personal animus left his place of work to conduct personal business and attempted to direct and guide the prosecution, imposition of penalties and conditions on Dr. Dachman. Dr. Dachman also requested the right to take depositions which was denied. On November 4, 1996 the Court conducted hearing on Dr. Dachman's Motion for Reconsideration. At the hearing the Court erroneously determined that it was within W. Schwieterman's scope of employment not only to contact the police but also to file criminal charges against Dr. Dachman even if he were not authorized by the FDA or had unreasonable animus against Dr. Dachman. The Court stated no amount of discovery would alter its decision even though the issue of fraud and controverted testimony was mentioned at the hearing. The Court substituted the United States as defendant and dismissed the Complaint without prejudice. The District Court recapitulated its findings in two separate orders which were entered on November 8, 1996. On December 5, 1996 Dr. Dachman filed her notice of appeal, appealing all previous adverse orders including the order denying Plaintiff Motion for Scope of Employment Determination/Request for Discovery/Evidentiary Hearing, and

granting the United States' Motion for Substitution. The Court of Appeals heard oral arguments on December 4, 1997 during which time the issue of false statements in the criminal complaint papers were noted, as was controverted testimony. On July 23, 1998 the Court issued its opinion denying Dr. Dachman's appeal. A Petition for Rehearing and Suggestion for Rehearing in Banc was submitted on September 6, 1998 indicating that discovery was critical since there was fraud and possibly "fraud on the Court". This was denied without opinion on September 21, 1998.

REASONS FOR GRANTING THE WRIT

The Court of Appeals in the Fourth Circuit made three significant comments:

a. They opined that filing a criminal complaint was incidental to W. Schwieterman's duties as a supervisory medical officer and therefore within the scope of his employment.

b. There was no exhaustion requirement for an investigation prior to filing a criminal complaint.

c. That the standard for de novo review was satisfied by the affidavits and records that were submitted to the Court obtained for the scope of employment determination and that additional depositions and discovery was not necessary to satisfy the requirement of de novo review.

Petitioner respectfully disagrees with the decisions of the Fourth Circuit Court of Appeals and requests that the Court grant her certiorari to review these critical decisions that have significant impact on the rights of government and other employees.

I. THE FOURTH CIRCUIT'S DECISION CONFLICTS WITH THE INTERPRETATION OF "SCOPE OF EMPLOYMENT" USED IN OTHER CIRCUITS, AND AS A MATTER OF LAW, FILING A CRIMINAL COMPLAINT IS NOT IN THE SCOPE OF EMPLOYMENT OF A NON-INVESTIGATORY NON-JUDICIAL GOVERNMENT OFFICIAL.

1. The Appeals Court affirmed the District Court's decision that filing of a criminal complaint, though not explicitly authorized by FDA procedures, is incident to the duties of a supervisory medical officer in the FDA and therefore under the "scope of employment" and deserving of immunity to suit. This opinion is contrary to that articulated in Maryland law which is decisive in determining the criteria for "scope of employment" and to decisions in many other circuits. In other decisions the criteria for an action to be within the "scope of employment" of an individual's duty it must be implicitly or explicitly defined by regulation, job description, statute and/or be an usual activity performed by the individual as part of employment. In *LePore v. Gulf Oil Corp.*, 237 Md. 591, an assault that occurred while collecting a debt was not within scope of employment since the nature of the employment is not one that is likely to lead to use of force against another person, whereas it might be for guards or those who repossess property. *Nance v. Gall*, 187 Md. 656, stated "a distinction needs to be made in this connection, however, between those cases in which the action of the agent could have no effect other than the punishment of the offender (or accused) and those in which the action was done with a view to the recovery of the principle's property or the protection of his business . . . there is no liability on the part of the employer unless there is showing either that there was express precedent authority for doing the act or that the act has been ratified and adopted. . . . There is no implied authority in a person having custody of the property to take such steps as he thinks fit to punish a

person who he supposes has done something with reference to the property which he had not done." In *Watt v. United States,* 123 F. Supp. 906, the Court stated "Government's agents authority defined by statute or regulation cannot be extended by custom, usage or estoppel. A federal employee to be considered as acting within the scope of his employment with the Federal Tort Claims Act must be performing a task which he was employed to do and not some other task, the performance of which is proper concern of some other employee of the government". *Mendenhall,* 10 F. Supp. 122, stated "The mere fact that in the administration of a law some incidental pecuniary benefit may or does accrue to government as is the case in respect to the forestry laws, does not constitute it a revenue law with said section or common construction. If it did there is hardly any federal officer but would come within the provision of said section." (When a forestry official executing a search and then tried for malicious behavior relied on revenue law for removal and immunity.), *Hatahley v. United,* U.S. 173 (the federal agents were under the provision of federal range code . . . authorizing federal range manager to proceed under local impoundment law and procedure.) This case makes it clear that for local law to be part of a federal duty there has to be specific government authorization via regulation or another judiciary body. In *Cooper v. O'Connor,* acts of a public officer are performed within the "scope of official duties" if such acts are done in relation to matters committed by law to the officer's control or supervision or are governed by a lawful requirement of a department under whose authority officer is acting. In *Oklahoma v. Willingham,* 143 F. Supp. 445, "the defense he is to make is that his immunity from punishment by the state because what he did was justified by his duty under the Federal law because he did nothing else on which the prosecution could be based". Relevant to this case is the decision in *Central R. Co. v. Breuer,* 78 Md. 394, quoted in *Nance v. Gall, supra,* "the fact that he had the general

authority to look after and manage the affairs if defendant in running its cars on the street of Baltimore City . . . in no manner suggests he had—unless expressed authorization to do so by his principle—any authority to arrest a passenger." *Sawyer v. Humphries,* 322 Md. 257, 587 A.2d 471 (where conduct of the servant is . . . highly unusual . . . courts tend to hold that this in itself is sufficient to indicate that the motive was a purely personal one and outside the scope of employment). Also see, *Ennis v. Crena,* 587 A.2d 485; *Barr v. Matteo,* 79 S. Ct. 1336. When arrests occurred or involve improper methods they were initiated by agents who had the statutory right to make arrests. In *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics,* 456 F.2d 1339, "despite allegation of illegality . . . Federal Bureau of Narcotics agents were doing precisely what narcotics agents are suppose to do, namely make arrests in narcotics cases . . . thus acting "within the outer perimeter" of their line of duty." *Peterson v. Richardson v. Peterson,* 370 F. Supp. 259, "there was no showing that actions of the Investigators of Bureau of Health Insurance were outside the statutes, regulations and instructions in force at the time", *Phelps v. Dawson,* 97 F.2d 339. Congress was aware of this fact and therefore to ensure that an individual would have recourse for malicious arrests executed by government officials in the "scope of their employment" they allow for suits against the investigatory law enforcement officials under the Federal Tort Claims Act (FTCA). It is intuitive that if the government felt it critical to amend the FTCA statute to allow for suits against law enforcement officials who are involved in malicious prosecution it did not intend that non-investigatory/non-judicial government officials should be engaged in such actions as part of their "scope of employment". The Court's guidance in this matter will corroborate the intent that Congress had when it allowed for suits against investigatory and law enforcement officials under FTCA.

The issue of foreseeability is discussed in *Henley v. Prince Georges County*, 302 Md. 320, foreseeability, which is a criteria of scope, is defined by the nexus of assigned usual duties with the index action (that would mean in this case the nexus of a medical officer's duties with filing a criminal complaint).

The clear implication of these decisions is that federal employment does not guarantee a supervisor omnipotent power to enact and act on any law as he or she sees fit. Enforcement privilege is tailored to the duties that the individual was hired to do and nothing more. As such W. Schwieterman who was hired to do clinical trial design and analysis did not have any authority to file a criminal complaint under his "scope of employment", though he could do it as a private citizen of Maryland.

When conflict appears in these legal decisions it usually arises from confusion to do the terminology used to describe different kinds of relationships between government employment and activities. There appears to be three basic terms used: the "cloak of authority" which is the most superficial of the relationships and reflects the most limited correlation between official duties and the involved activity. It appears to describe a situation where the individual is a government official and the actions are unrelated to official work i.e. getting discounts because of federal employment. The term under "color of office" or "color of law" is legal basis of removal. Actions under the "color of law" are not necessarily granted immunity, though there is some causal relationship (temporal or geographic) between federal employment and the actions involved albeit very liimted, i.e. a mail carrier in a car accident. The term that defines an interactive nexus between government employment and actions is "scope of employment or office" which is the basis of immunity, substitution and FTCA claims. This term describes a relationship whereby the actions involved are existent solely because of government employment and duties. It appears that until recently the terms "color of law" and

"scope of employment" in many cases had been used interchangeably which has resulted in much confusion in the area and in decisions. It is only recently, most notably with the *Gutierrez,* supra decision that the distinction in application and responsibility between the two terms is being noted. The confusion though was previously noted by Judge Forman who in *Goldfarb v. Muller,* 181 F. Supp. 41, as cited in *Brenner v. Kelly,* 201 F. Supp. 871, stated "acts performed by an officer in the "performance of duties" are not synonymous with which would perform under the "color of office" and define when the United States should be substituted as party defendant and when the government assumes liabilities under the FTCA".

Specifically, in the current case the defendant actions in filing a criminal complaint was not authorized by any statute, guideline or regulations that defines the activities of a medical officer or the Division of Clinical Trials Design and Analysis (see Appendix J). Indeed there are others in the FDA who have the expressed duty to do such actions (see Appendices I, K, L). Under the "cloak of authority" and possibly "color of law", W. Schwieterman used his government status to initiate and direct the prosecution of Dr. Dachman. These activities though were not within the "scope of his employment".

Because of the confusion in the terminology that corresponds to the processes of removal and substitution and the resultant confusion in legal decisions, the Courts guidance is crucial to distinguish and standardize the duties involved in activities under the "color of law" and those that confer immunity under the term "scope of employment".

2. In addition to the fact that as a matter of law W. Schwieterman's actions were not under the scope of his employment since they were not delegated to him by statute or regulation, his actions also did not fulfill the criteria used to determine "scope of employment" accord-

ing to the doctrine of respondeat superior in the State of Maryland. According to the criteria presented in *Sawyers v. Humphries, supra,* the principle has to be able to control the actions of the officer. That was not the case here. W. Schwieterman could have filed charges at any time even before Monday which was 72 hours after the call came in. His superiors could not control when he went, could not direct him to file charges and could not direct what he wrote in the charging documents under oath. *Paley v. United States,* 125 F. Supp. 798, *aff'd,* 221 F.2d 958, *Nadler v. Mann,* 951 F.2d 301 (Assistant U.S. Attorney not in scope of employment when he leaked information regarding criminal investigation to the news media); *Sayles v. Piccadilly Cafeteria, Inc.,* 410 S.E. 2d 632 (1991) (employee was not acting within scope of employment but was wholly from external independent motive when he injured a third party in an automobile on the way home from a company Christmas party). *Katz v. National Paving & Contracting Co.,* 134 A.2d 296, 214 Md. 470 (it is the power to control the employee's or servants conduct wich is the controlling criteria of a contractual relationship.). In addition once under oath in the State of Maryland he was no longer under federal jurisdiction. As stated in *Maryland v. Soper,* 270 U.S. 36. "The right of the state to inquire into suspected crimes on its territory justifies . . . the questioning of suspects under oath. The response of the federal officer under suspicion of such questioning is not an act under his federal authority", *Heisig,* 178 F. Supp. 271.

Not only could the principle not control W. Schwieterman's actions but his actions were in disregard of agency applicable procedures (Appendices I, J, K, L). The filing of criminal complaints is either in realm of the Inspector General or Office of Internal Affairs/Office of Criminal Investigation not under the realm of the Division of Clinical Trial Design and Analysis. This once again emphasizes that W. Schwieterman's actions in filing a criminal complaint were not under the scope of his employment or

division but were wholly the result of his own personal motives. Had he been truly concerned about safety then Dr. Dachman would have been put on administrative leave immediately or there would have been an immediate arrest, which was not the case. Dr. Dachman was not placed on administrative leave until 24 hours after she was informed there was a warrant out for her arrest and she was not arrested until 1 week after the "threat call" came in and there was no intervening investigation nor did the agency allow her to clear herself during this time though she attempted to do so.

3. The origins of "scope of employment" legislation was to protect federal officials involved in pursuing federal interests from interference by state authorities and state law. Scope of employment and color of law statutes with attendant removal of cases involving federal employees involved in state legal action while under the "scope of their employment" or "color of law" arose out of the historic interference of some states, notably S. Carolina, with the collection of customs of the United States and nullification of federal revenue statutes. The constitutionality of removal was upheld in *State of Tenn. v. Davis,* 100 U.S. 257. These statutes were passed to circumvent local state laws from preventing federal revenue collectors from carrying out their duties. Initially it was limited to revenue officers and was slowly expanded until in 1948 the law was extended to all government officials. This is the inherent recognition of the distinction between state law and federal law. Parenthetically an additional source of law for immunity and scope of employmnt was developed when the Driver's Liability Act, which granted immunity based on "scope of employment" to government drivers was expanded to the Federal Tort Reform Act. This does lead to some confusion.

Ironically in the current case Dr. Dachman, a federal medical officer, was doing her duties and expediting the licensure of a product. She was restrained and limited in her ability to carry out her assigned duties as a result of a

fraudulent arrest under state law. W. Schwieterman filed charges in the state of Maryland under state law and prosecution was under the State of Maryland. It was not removed to Federal Court as would have happened if it were a terrorist event and therefore was a state act and consequently his role as a government employee was irrelevant to the proceedings. Thus W. Schwieterman was not under the "scope of his employment" when he swore out charges under oath in Maryland. See re *Heisig, supra,* and *Maryland v. Soper*, 270 U.S. 36, "the questioning of suspects under oath. The response of a federal officer under suspicion of such questioning is not an act of his under federal authority". To have had this action a Federal one the U.S. Attorney would have had to be involved as was the case in *Novak v. Department of Treasury,* 12 M.S.P.R. 455, where the U.S. Attorney filed charges in an assault. Alternatively there would have had to be written arrest authority from the U.S. Attorney as was the case in *Van Schaick v. United States*, 586 F. Supp. 1023. Of note the IRS that routinely makes arrests has a paradigm (assault investigation program) for dealing with hostile taxpayers and the possibility of arrest and in this paradigm it is the U.S. Attorney's office that formally makes the arrest (Appendix R).

4. As has been indicated authorization in government is not whimsical permission but is a very serious legal status that must be conferred by statute, *Jordan v. Hutcheson,* 323 F.2d 597 "since any act not authorized by state law would not have the cloak of legislative immunity." *Clipper v. Takoma Park Md.,* 876 F.2d "the authority of a state officer to make an arrest is, of course, to be determined according to state law".

For the aforementioned reasons, since as a matter of law W. Schwieterman's actions were not under the scope of his employment, since they were not under control of his principle nor carried out for the benefit of principle, since his action clouds the distinction and jurisdiction between State and Federal domain and lastly to close the loophole

in current FTCA law and impart to it the intent that Congress had when they indicated those who are entrusted with law enforcement authority will be held accountable for malicious acts, since an arrest is a very serious invasion of person, Petitioner respectfully requests that this Court offer guidance in the matter and grant certiorari.

II. THE FOURTH CIRCUIT'S DECISION STATING THERE IS NO EXHAUSTION REQUIREMENT FOR AN INVESTIGATION PRIOR TO FILING A CRIMINAL COMPLAINT IS CONTRARY TO THE DECISIONS IN OTHER CIRCUITS AND VIOLATES THE FOURTH AND FIFTH AMENDMENT RIGHTS.

The opinion of the Fourth Circuit is simply contrary to that of Supreme Court in *Hannah v. Larche,* 363 U.S. 470 where it is clearly stated that when a federal agency is contemplating an adjudicative process that will change legal status," it is imperative that those agencies use the procedures which have traditionally been associated with the judicial process". This would mandate an investigation prior to filing of a criminal complaint as a federal employee. In *Clipper v. Takoma Park Md.,* 867 F.2d 17 the Court found that the officer lacked probable cause for arrest because information upon which officer relied was speculative and officer failed to investigate potentially exculpatory leads such as prints from bank surveillance. Similarly in *Sevigny v. Dicksey,* 846 F.2d 953 the holding officer who failed to avail himself of readily available information which would have confirmed Plaintiff's explanation of events was not entitled to qualified immunity for unlawful arrest. This concept is noted in *Dunnington v. Department of Justice,* 956 F.2d 1157, "given the reality of the manner in which the arrest warrants often issues it is incumbent upon the Agency when an arrest warrant is a major part of the case to assure itself that the surrounding facts are sufficient to justify summary action by the Agency". In *Dunaway v. New York,* 99 S. Ct. the

court indicated that common rumor or report, suspicion or even strong reason to suspect was not adequate to support a warrant for an arrest. In *Montgomery Ward v. Frances Wilson,* 101 Md. Ap. 535 stated that "failure to make an adequate investigation of suspicious circumstances may destroy probable cause as a defense. . . . So that probable cause does not exist if a proper investigation could have cleared the accused". In the case cited that there was no comparison of handwriting that could have cleared the Plaintiff, and in *Montgomery Ward & Co., Inc. v. Alphonso Keulemans,* "the impact of the restatement rule and comments is that a failure by a private prosecutor to pursue a course of further investigation may play heavily upon the question whether probable cause exists, if the circumstances are such that a reasonable man would have pursued such a course". This case mentions the *Leon* criteria that determines if an immediate arrest is appopriate or an investigation should ensue, the basic principles are:

1. the necessity of prompt action to prevent escape
2. availability of information
3. opportunity to obtain information from the accused or ascertain his report
4. the character of the source of information on the accused.

According to this criteria since Dr. Dachman was available on Friday, July 15, 1994 and even came into W. Schwieterman's room he should have asked her whereabouts and if safety was such a concern then Dr. Dachman should have been put on leave, the place secured on Friday not Tuesday 24 hours after the complaint was filed. Therefore there was no justification not to investigate and the lack of such action invalidates the criminal proceedings and are not in the "scope of his employment" as a federal officer since government officials are required to protect "due process" rights, *Hannah, supra.*

The underlying theoretical reasoning mentioned above for requiring an investigation is that lack of an investigation denies the accused "due process" rights that are constitutionally guaranteed by the 5th amendment and may also invalidate "probable cause" in an arrest which is guaranteed by the Fourth Amendment. In *Abright v. Oliver,* 114 S. Ct. 807. Justice Stevens in his dissent concluded "formal commencement of a criminal poceeding . . . an official accusation of serious crime has a direct impact on a range of identified liberty interests, that impact moreover is of sufficient magnitude to qualify as a deprivation of liberty meriting constitutional protection". *Greene v. Elroy,* 360 U.S. 474. "In the area of questionable constitutionality this Court will not hold that a person may be deprived of the right to follow his chosen profession without full hearing where accusers may be confronted and cross-examined when neither the President nor Congress has explicitly authorized such procedure." The historical basis for the protections guaranteed by the Fourth and Fifth Amendments are stated in *Dunaway v. New York, supra,* "hostility to seizures based on mere suspicion was a prime motivation for the adoption of the Fourth Amendment and decisions immediately after its adoption affirmed that "common rumor or report suspicion or even strong reason to suspect was not adequate to support a warrant for arrest". This right has been critical in America and government officials who violate clearly established statutory or constitutional rights lose their immunity. *Harlow v. Fitzgerald,* 457 U.S. 800 (1974).

Also see *Brady v. Maryland,* 373 U.S. 83 regarding suppression of evidence is a violation of due process and *Mooney v. Holohan,* 294 U.S. 103 for perjured testimony violating due process. The need for an investigation is also the reason that this Court decided in *Gutierrez* that judicial review is critical in "scope of employment" certification, quoting *re Murchison,* 349 U.S. 133, [O]ur system of law has always endeavored to prevent even the probability of unfairness. To this end "no man can be a judge

in his own case and no man is permitted to try cases where he has an interest in the outcome" which was the case here when W. Schwieterman, the purported victim and the supervisor, went to file criminal charges against Dr. Dachman.

Therefore Petitioner concludes that the Appeals Court erred in justifying the filing of criminal charges against Plaintiff without an investigation, since an investigation would have proven Dr. Dachman's innocence and prevented the damage it caused her. The opinion of the Fourth Circuit conflicts with the basic constitutional tenets of this country and as such the Court should grant certiorari to unequivocally clarify the need for investigation and proper attention to due process rights and other constitutional guarantees for federal officials. In addition in certain cases perjourous testimony has been found not to be in the "scope of employment", see *Heisig, supra,* as would be the case with a fraudulent, framed charge. Also see *Ennis v. Crena, supra.*

III. DE NOVO REVIEW AND DISCOVERY IS ESSENTIAL IN SCOPE OF EMPLOYMENT DETERMINATION WHEN THERE IS DISPUTE OF FACT AND INFERENCES AND THERE IS ISSUE OF FRAUD, FALSE TESTIMONY AND "FRAUD ON THE COURT".

The Appeals Court stated that the affidavits and the documentation provided to the District Court satisfied the standard for de novo review. Petitioner contests this, see *Wilson v. Jones,* 902 F. Supp. 678, and states the decision is contrary to the position taken in many circuits and by this Court especially since the issue of fraudulent testimony with regard to the criminal charge was material and mentioned in the proceedings. This decision is in conflict with the intent of de novo review, *McHugh v. University of Vermont,* 966 F.2d 67, "Before such property rights can be eliminated, however, a plaintiff is entitled to a due process hearing on whether the

federal employee was acting within the scope of employment"; *Schrob v. Catterson*, 967 F.2d 929, "if there is genuine issue of material fact as to the scope of employment question, district court should permit discovery and conduct a hearing, if necessary, but should insure that both discovery and the hearing are circumscribed as narrowly as possible"; *Petrousky v. United States*, 728 F. Supp. 890, "to avoid constitutional deficiencies, the Court determines that the scope of employment certification is not entitled to deference. Accordingly the court considers the issue de novo." In the present case where there was an arrest and fraudulent testimony there should have been minimal discovery and deposition to review certification and determine whether indeed there was "probable cause" for the warrants and so that petitioner could have demonstrated by the preponderance of evidence that W. Schwieterman was not acting under the "scope of his employment" when he filed charges, *Heisig, supra.* Furthermore, the United States' motion for substitution should be treated as a motion for summary judgment and where, as here, material factual and credible disputes exist, the district court should permit discovery and conduct an evidentiary hearing. *Wilson v. Jones*, 902 F. Supp. 678; *Schrob v. Catterson, supra* (the mere status of being a federal employee does not guarantee total immunity from the judicial process). Since it is a summary judgment, Dr Dachman was entitled to have the most favorable of inferences. *Ross v. Commun. Satellite Corp.*, 750 F.2d at 364; *United States v. Diebold, Inc.*, 369 U.S. at 655; *Anderson v. Liberty Lobby*, 477 U.S. at 248; or if there was dispute concerning conclusion or inferences, *Haavistola v. Community Fire Co.*, 812 F. Supp. 1383; *Sosebee v. Murphy*, 797 F.2d 179; *Davis v. Zahradnick*, 600 F.2d 458 (summary judgments inappropriate where affidavits present conflicting versions, and where state of mind is issue); *Green v. Wells*, 329 F. Supp. 559; *Cross v. United States*, 336 F.2d 431. On this basis alone the Court should have granted de novo review. In addition, under

rule FRCP 56(f) there should have been deferment of ruling on summary judgment to allow for discovery. *Nguyyen v. CNA Corp.*, 44 F.3d 242; *Wichita Falls Office Association v. Banc One Corp.*, 978 F.2d 915, 508 U.S. 910; *Donofrio v. Camp*, 470 F.2d 428 (the trial judge is permitted to grant a continuance to the non-moving party to use discovery to obtain the information necessary to show issue of fact in dispute); 10A Charles A. Wright, Federal Practice and Procedures, § 2740 at 432 (2nd ed. 1983 & Supp. at 1993); *Evans Technologies Applications & Serv. Co.*, 80 F.3d 954 (4th Circuit); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 257, *Celotex Corp. v. Catrett*, 477 U.S. 317 (summary judgment is proper after adequate time for discovery).

In addition, as mentioned, this case is distinguishable because it was indicated to both lower courts that there was fraudulent testimony in the charging papers and that the entire arrest may constitute fraud. There was suspicion that another employee made the tape, and knowledge that the charging papers contained false testimony in violation of 18 U.S.C. § 1001 and that Dr. Dachman had always insisted she was framed. Therefore, since these are significant material facts, discovery should have been granted. *Franks v. Delaware*, 98 S. Ct. 2674 "where defendant makes substantial preliminary showing that false statement knowingly or intentionally with reckless disregard for the truth was included by affiant in search warrant affidavit and if allegedly false statement is necessary to finding of probable cause, Fourth Amendment requires that hearing be held at defendant's request". In *United States v. Gaudin*, 115 S. Ct. 2310, this Court determined that a judge's decision not to submit question of "materiality" of false statement to jury was unconstitutional, all the more not to allow for discovery in the matter. In *Publicker v. Shallcross*, 106 F.2d 949, the court has entitled a party to relief from unjust judgment arrived at through mistake, inadvertence or misconduct

and in this case there was gross misconduct by an official. The fraud in this case has been stated to be so perversive that it may constitute FRCP 60(b)3 "fraud on the Court" and as such, petitioner was entitled de minimis to discovery since for "fraud on the Court" the Plaintiff is entitled to judgment. *Hazel-Atlas Glass Co. v. Hartford Empire Co.*, 64 S. Ct. 997; *Lockwood v. Bowles*, 46 F.R.D. 625; *Roof Ref Co. v. Universal Oil Prod. Co.*, 169 F.2d 514; *Fraige v. American National Watermattress Corp.*, 996 F.2d 295; *Intermagnetics America, Inc.*, 926 F.2d 912.

The Court's guidance on the role and scope of de novo review of certification in situations involving arrests and in situations involving controverted testimony and false statements is critical and therefore certiorari should be granted.

CONCLUSION

Since by law W. Schwieterman's act of filing a criminal complaint was not under the scope of employment, as a matter of law there should have been an investigation to protect Petitioner's due process rights and the lack therefore vitiates "probable cause", and since there were issues of false testimony and fraud regarding the charging papers and authorization that require discovery and de novo review of scope certification, the Court should grant certiorari and clarify the mechanism and criteria that federal officials should follow in fiing criminal complaints to protect due process rights and provide recourse to petitioners who are subject to arrests and damages based on false testimony on warrants.

Respectfully submitted,

S. REBECCA DACHMAN, M.D.
717 Sonata Way
Silver Spring, MD 20901
(301) 681-4232
Petitioner, Pro Se

APPENDICES

APPENDIX A

Per Curium Opinion of the United States Court of Appeals for the Fourth Circuit—unpublished

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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 96-2817

S. REBECCA DACHMAN,
Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA,
Defendant-Appellee,

and

WILLIAM DAVID SCHWIETERMAN,
Defendant.

Appeal from the United States District Court
for the District of Maryland, at Greenbelt.
Peter J. Messitte, District Judge.
(CA-96-1261-PJM)

Argued: December 4, 1997
Decided: July 23, 1998

Before MURNAGHAN and MOTZ, Circuit Judges, and BUTZNER, Senior Circuit Judge.

OPINION

PER CURIAM:

Dr. Rebecca Dachman appeals the district court's dismissal of her case, its decision to substitute the United States as defendant, and its finding that Dr. William Schwieterman was acting within the scope of his employment when he filed criminal charges against her. We affirm.

I

On July 15, 1994, Schwieterman, the acting Branch Chief in the Food and Drug Administration's Clinical Trials Branch and Dachman's immediate supervisor, received a death threat on his voicemail. He promptly reported this incident to his supervisors and they instructed him to contact the police. Schwieterman informed his supervisors that he believed Dachman left the message. On July 18, 1994, before the police or the FDA had completed their investigation, Schwieterman filed an Application for a Statement of Charges in the District Court of Maryland for Montgomery County. Based on that application Dachman was arrested on July 22, 1994. On December 20, 1994, the state entered a *nolle prosequi*. The FDA subsequently concluded that the claim against Dachman was unsubstantiated.

On February 26, 1996, Dachman filed this action in a state court against Schwieterman alleging malicious prosecution, negligence, and abuse of process. On April 22, 1996, the United States filed a petition of removal and moved to be submitted as the party defendant, certifying that Schwieterman was acting within the scope of his employment and, therefore, the plaintiff's sole remedy was

against the United States. 28 U.S.C. § 2679. The district court granted this motion despite the plaintiff's opposition and then, based on this ruling, dismissed the complaint for lack of subject matter jurisdiction, because Dachman had not exhausted her administrative remedies pursuant to 28 U.S.C. § 2675.

II

Both the district court and this court review the Attorney General's certification of the scope of employment *de novo*. *Gutierrez de Martinez v. Lamango*, 515 U.S. 417 (1995); *Gutierrez de Martinez v. Drug Enforcement Admin.*, 111 F.3d 1148, 1152 (4th Cir. 1997) (on remand from the Supreme Court); *McHugh v. Univ. of Vermont*, 966 F.2d 67, 71-74 (2d Cir. 1992). In *Maron v. United States*, 126 F.3d 317, 322-23 (4th Cir. 1997), we held that the plaintiff has the burden of proving by a preponderance of the evidence that the government employee was not acting within the scope of his employment.

Dachman claims that the district court erred when it failed to conduct a *de novo* review of the scope of employment issue and when it denied her further discovery on material issues of fact concerning Schwieterman's employment. Dachman misunderstands the district court's actions. The district court applied the correct standard of review to the issue, and properly held that further discovery on the scope of employment issue was unnecessary.

The district court did not merely accept the government's certification as conclusive. The court made a thorough inquiry into the issue that spans 40 pages in the joint appendix. During this inquiry in response to Dachman's motion for reconsideration, the court undertook its duty to determine whether Schwieterman was acting within the scope of his employment. After both sides had an opportunity to present their case, the district court reached its decision. We find that the court met its obligation to conduct a *de novo* review of the issue. The district court's

review was not the kind of rubber stamp denounced in *Gutierrez de Martinez*, 515 U.S. at 429.

Dachman claims that further discovery is required on a number of disputed facts. The core facts of this case, however, are undisputed. Schwieterman received a threat that he correctly took seriously. The threat was received on the employer's premises during working hours. Further, there is no dispute that Schwieterman contacted his supervisors about the threat, that they instructed him to call the police, and that this initial call was within the scope of his employment. Later his supervisor excused him from work during business hours so that he could file an application for a statement of charges in the state district court. His supervisor concluded her affidavit by stating: "At all times relevant to the aforementioned incident Dr. Schwieterman was authorized by me to conduct himself the way he did." A.82. Although Dachman disputes the details, there is no dispute that Schwieterman called security guards to remove Dachman from his office two days prior to the death threat. After listening to all the undisputed facts, the court decided that further discovery on the certification issue was unnecessary.

III

Dachman also asserts that the district court erroneously determined that Schwieterman was acting within the scope of his employment under Maryland law. Both parties agree that Maryland law controls this issue. Under Maryland law an act is within the scope of employment if it is authorized. *Sawyer v. Humphries*, 322 Md. 247, 255, 587 A.2d 467, 470-71 (Md. 1991). An act is authorized if it "was incident to the performance of the duties entrusted to [the servant] by the master, even though in opposition to [the master's] express and positive orders." *Id.* at 255, 470 (quoting *Hopkins Chem. Co. v. Read Drug & Chem. Co.*, 124 Md. 210, 214, 92 A. 478, 479-80 (Md. 1914).

In applying this test a court determines if the conduct is of the kind that the servant is employed to perform, occurs during a period not unreasonably disconnected from the authorized period of employment in a locality not unreasonably distant from the authorized area, and is actuated at least in part by a purpose to serve the master. *Id.* at 255, 471.

Dachman maintains Schwieterman acted outside the scope of his employment. She claims that filing criminal charges was not the kind of work that Schwieterman was employed to perform and that he filed the charges to satisfy his personal motives. She also claims that he did not act with the authorization of his supervisors and that Schwieterman disregarded applicable written procedure by filing the criminal charges.

Dachman's analysis of Schwieterman's actions is incorrect. Schwieterman was employed by the FDA as a doctor, and we agree that he was not hired to file criminal charges againnst other employees. Part of his job, however, was to ensure workplace safety. FDA procedures required Schwieterman to report possible criminal conduct or general misconduct. Schwieterman followed all applicable procedures by reporting the incident to his supervisors and the police. Dachman concedes Schwieterman's initial report to the police was within the scope of his employment. While the applicable FDA procedures do not address the filing of criminal charges, we hold that filing criminal charges after contacting the police about a death threat was a foreseeable step and is not an act which takes Schwieterman's conduct outside the scope of his employment.

Dachman places great weight on the fact that Schwieterman did not wait for the police or the FDA to finish their investigations before he filed criminal charges. Dachman's reliance on this fact is misplaced. There is no exhaustion requirement in the FDA procedures, nor did Schwieter-

man's supervisors tell him to wait for the investigations to finish before filing charges. Filing criminal charges before the investigations were complete was still an authorized act done in furtherance of the FDA's legitimate business interest of safety.

AFFIRMED

APPENDIX B

Memorandum and Order Denying Plaintiff's Motion for Scope of Employment Determination/Request for Discovery and Granting Motion for Substitution

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil No. PJM 96-1261

S. REBECCA DACHMAN
Plaintiff

v.

WILLIAM D. SCHWIETERMAN
Defendant

MEMORANDUM OPINION AND ORDER

Plaintiff S. Rebecca Dachman, M.D. sues Defendant William D. Schwieterman, M.D. for malicious prosecution and related torts because Schwieterman filed criminal charges against her with the Montgomery County, Maryland authorities. Schwieterman, who was Dachman's coworker and supervisor at the U.S. Food and Drug Administration in Rockville, believed Dachman had left telephone threats against him at their office at the Food and Drug Administration in Rockville. The parties apparently have a contentious employment history between them.

Dachman's suit was originally filed in the Circuit Court for Montgomery County but was removed to this Court when the U.S. Attorney for this District argued, pursuant to 28 U.S.C. Section 2679, that Defendant was acting within the scope of his government employment relative to the underlying factual situation. The United States now requests that it be substituted as defendant, pursuant to 28 U.S.C. Section 2679(b) and 28 U.S.C. Section 1346(b).

Dachman protests and says Schwieterman "was not acting within the scope of his federal government employment at the time he maliciously initiated a groundless criminal prosecution" against Dachman. She asks for an opportunity to conduct discovery, as well as a hearing on the scope of employment issue.

The Court will DENY the Plaintiff's Motion for Judicial Scope of Employment Determination and GRANT the motion for Substitution. The Court holds that Schwieterman was acting within the scope of his employment as a matter of law. He was Plaintiff's co-worker and supervisor at FDA, had had a series of employment-related disputes with her, and received the call he (rightly or wrongly) believed was from Plaintiff at their place of employment. He reviewed the phone tape with his supervisors at work, who confirmed his suspicion that Plaintiff was the caller, then contacted the Montgomery County police.

No amount of further discovery would alter these facts. Even if it could be established that Defendant had an unreasonable animus against Plaintiff, his actions in contacting the police would still, objectively speaking, be sufficiently employment related.

ORDER

Accordingly, it is this 28th day of June, 1996,

ORDERED that Plaintiff's Motion for Judicial Scope of Employment Determination/Request for Discovery is hereby DENIED; and it is further

ORDERED that the Motion for Substitution filed by the United States is hereby GRANTED.

/s/ Peter J. Messitte
PETER J. MESSITTE
United States District Judge

APPENDIX C

(Denial of the Petition for Rehearing and Suggestion for Rehearing in Banc)

[Filed September 21, 1998]

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 96-2817
CA-96-1261-PJM

S. REBECCA DACHMAN,
Plaintiff-Appellant

v.

UNITED STATES OF AMERICA,
Defendant-Appellee

and

WILLIAM DAVID SCHWIETERMAN,
Defendant

On Petition for Rehearing with
Suggestion for Rehearing In Banc

The appellant's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied.

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

For the Court,

/s/ Patricia S. Connor
Clerk

APPENDIX D

Order Denying Plaintiff's Motion for Reconsideration

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil Action No. PJM 96-1261

S. REBECCA DACHMAN,
Plaintiff

v.

THE UNITED STATES OF AMERICA,
Defendant

ORDER

Upon consideration of Plaintiff's Motion for Reconsideration and Defendant's Opposition thereto, it is for the reasons stated on the record this 5th day of November, 1996

Ordered that Plaintiff's motion is hereby DENIED.

/s/ Peter J. Messitte
PETER J. MESSITTE
United States District Judge

APPENDIX E

Order of Dismissal of the United States District Court for the District of Maryland

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil Action No. PJM 96-1261

S. REBECCA DACHMAN,
Plaintiff

v.

THE UNITED STATES OF AMERICA,
Defendant

ORDER OF DISMISSAL

Upon consideration of Defendant's Motion to Dismiss and Plaintiff's Opposition thereto, it is for the reasons set forth on the record this 5th day of November, 1996

Ordered that Plaintiff's Complaint in this case is hereby DISMISSED WITHOUT PREJUDICE.

/s/ Peter J. Messitte
PETER J. MESSITTE
United States District Judge

APPENDIX F

Excerpts of the Transcript of Motions Hearing Before the Honorable Peter J. Messitte, United States District Judge

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IN THE UNITED STATES DISTRICT COURT
SOUTHERN DIVISION OF MARYLAND

PJM 96-1261

S. REBECCA DACHMAN,
Plaintiffs,

v.

WILLIAM D. SCHWEITERMAN, *et al.*,
Defendants.

November 4, 1996

TRANSCRIPT OF MOTIONS HEARING
BEFORE THE HONORABLE PETER J. MESSITTE,
UNITED STATES DISTRICT JUDGE

* * * *

[3] But that's not the issue. The issue is whether Dr. Schwieterman, who is government physician, who's employees—excuse me. Whose employment responsibilities relate to clinical trial design and analysis, whether he was acting within the scope of his employment under state law when he swore out criminal charges that resulted in Dr. Dachman's arrest and detention, and eventual prosecution, and in doing so, failed to await the outcome

of either the police or any agency investigation, disregarded applicable FDA policies and procedures, took matters into his own hands, left his regular place of employment to conduct what amounted to personal business, and then personally tried to guide and directly prosecution with respect to the imposition of penalties and what was done with the prosecution once it was initiated.

With all of these things, having no relationship to whatsoever to the type of conduct that Dr. Schwieterman [4] was employed to perform.

* * * *

[13] Dr. Schwieterman gave the impression in his affidavit that—that he contacted the police as the security personnel at FDA told him to do, and that—and [14] that Officer Matney, the officer with whom he spoke, told him he should go file a complain with the commissioner. That's also not true.

The signed statement that Dr. Schweiterman had given prior to the affidavit that he gave in connection with this proceeding indicates that on the very first day that he spoke with officer, which would have been Friday afternoon, the day of the telephone call, that he asked—that he asked the officer about the procedure for filing a criminal complaint, and that the officer simply had advised him of what the procedure was.

So Dr. Schwieterman, as early as Friday afternoon, was intent on himself filing criminal charges in this, in this matter, and this was something that he undertook himself.

And all we're asking for, Your Honor, is the opportunity, there are any number of conflicting statements with respect to this issue, and all we're asking for is a limited opportunity to do some discovery on this.

And, if necessary, as I believe the case law says is required to have an evidentiary hearing on the scope of employment issue, if it's still necessary after the discovery has been done.

* * * *

[27] MR. STORM: Well, I would—I would suggest to the Court that, by leaving the work place and going down and filing for an arrest warrant on a fellow employee, who's also a physician, that that is—that, yes, he does, that he's exceeded the scope of his employment at that poinnt.

Your Honor, I would suggest to the Court that in the Gutierrez versus Lamango decision that the Court, Supreme Court, cautioned against rubber stamping.

THE COURT: I have no quarrel with the idea that evidentiary hearing, the question is whether an evidentiary hearing could do anything in this case. I think that's a correct statement of the law.

But are there unalterable facts in this case that simply could not be affected by whatever you're going to put on here? If you were to establish, for example, that he had some animous against her, okay, but what else?

MR. STORM: Let's assume there was someone else at the agency who made have phone call, and it turns out he knew it was someone other than Dr. Dachman.

THE COURT: In other words, if the evidence would show that he fabricated this whole thing?

MR. STORM: Right, right.

* * * *

[35] THE COURT: All right. This matter is before the Court on plaintiff's motion to reconsider. The Court entered an opinion and order on June 28, 1996, in which it denied plaintiff's motion for judicial scope of employment determination and request for discovery.

In this matter, the defendant sued Dr. Schwieterman, who is, was, a federal employee, and the United States requested, pursuant to 28 United States Code, Section 2679(b) and section 1346(b), to be [36] substituted as a defendant, on the ground that with regard to the underlying facts situation, the defendant was acting within the scope of his employment.

The circumstantial facts are not disputed, at least the nature of the claim. This is a suit for malicious prosecu-

tion and related torts, brought by Dr. Dachman against Dr. Schwieterman on the ground that he allegedly maliciously had prosecuted her and filed, had criminal charges filed against her with the Montgomery County authorities.

The fact pattern, again, basically, was that the phone call was received at the Food and Drug Administration office of Dr. Schwieterman, with words that certainly would—could be construed as threatening bodily harm, the operative words "you will kill you," whatever that might mean, suggested bodily harm that Dr. Schwieterman believed that it was Dr. Dachman, that there had been a contentious employment history between them, that she had been physically removed from his office no more than two days before that incident, that co-workers at the time did hear the voice and were not clearly of the mind that it was not Dr. Dachman calling, that Dr. Schwieterman did make a report to the FDA regarding these events, and did contact the Montgomery County Police. And to that point, apparently, there's no dispute [37] that he was acting in reasonable—as a reasonable employee would.

The argument that's made by the plaintiff on reconsideration is that this case is not about contacting the police, it's about filing the criminal charges.

Although the Court believes it did comprehend that in its opinion, and I am not going to address that now, there is not on this record anything that makes the action of the defendant Schwieterman in contacting the police outside the scope of his employment, given the fact that he was the plaintiff's supervisor, given the fact that he had some cause, and I'm not deciding that issue now and forever, to have the matter pursued and call the police, it was also protected for him to have the charges filed.

Should he have done it? Was it prudent? Maybe not. But was he entitled to do it? Yes.

Should the employer be liable if he was acting in the scope? Certainly, if it was a private employer, they well might be, if he lacked probable cause.

This is the United States government, though, and this is a special law that applies, the Federal Tort Claims Act, which immunizes federal employees from all sorts of torts that might be committed in the course of their employment, and puts the government in the place of [38] the defendant.

And there may be immunity that the government has, but that's the way Congress has structured this. It is undisputed that a supervisor in an employment situation, when there's a threat, either to the supervisor, or apparent threat to the supervisor, or somebody in the office, that suggests bodily harm, acts properly in contacting the police, acts properly in having criminal charges filed.

And, frankly, I may go beyond what I need to here, it really doesn't matter whether other people in the office say you should or shouldn't go forward. It's a judgment call and he did it.

And it's simply not the kind of thing that would remove him from the scope of his employment. There's nothing on this record that can be further affected by discovery in this case.

Those facts are unalterable. And even, I suggest, if it were to eventuate that he had some unreasonable animous against Dr. Dachman, the fact is objectively on these facts there can be only one conclusion, and that is, he was properly acting in the scope of his employment.

Ultimately, whether he was factually correct in doing that is something else, but the motion to reconsider [39] is denied.

Now, there's a motion to dismiss pending as well, and I don't know what you do with that. Is that before me today?

MR. RUSSELL: Yes, Your Honor.

THE COURT: What, is it really much to say about that? Do you concede, in the government's in the case, that there's immunity?

MR. STORM: Well, there's certainly immunity from the intentional tort clams, there is a negligence count, but there's no dispute that we have not gone through that tort claims act procedure.

THE COURT: Is there any basis for federal jurisdiction? This case was removed, I mean, this case the court will simply dismiss the case or remand whatever remains in the state claim to the state court.

I don't know where you are on that, Mr. Russell. What's your view?

MR. RUSSELL: My view, Your Honor, is that, as far as the intentional torts are concern, there are, in the negligence claim, is barred for failure to exhaust administrative remedies.

THE COURT: There hasn't been any claim made under the Federal Tort Claims Act. Well, that's a problem.

[40] MR. RUSSELL: And I believe that they may end up taking a different action in its entirety.

MR. STORM: The only other claim, there was a claim asserted under the state constitutional claim, I suppose similar to a Bivens type federal claim, but asserted under the state constitution, so that's another claim that is in the amended complaint. I don't know what your position is on that.

MR. RUSSELL: Well, you know, as far as we're—as far as the defendant is concerned, we'd end up denying that claim. And I'm not quite sure where exactly what status we're in with regard to that amended complaint, whether or not service was completely affected or things of that nature, that prior to the time of the removal.

But I do—but I do contend that as far as the tort claims are concerned, they are out. And state constitutional law violation would be out, because it is a state constitutional claim as opposed to federal.

THE COURT: Do you contend, though, that the Court's decision though, disposes of the state constitutional claim?

MR. RUSSELL: I would say that it would be dispose the state constitutional claim only to the extent it alleges a violation of the state constitution, not—

THE COURT: You said there are claims assertible [41] under state law could be asserted. I just don't know that it gets done in this court. All right.

Anything further?

MR. STORM: No, Your Honor.

THE COURT: All right. The Court now turns to defendant's motion to dismiss, having found that the United States is properly substituted for the defendant Schweiterman in this case, and I gather there has been no exhaustion of any administrative remedy with regard to any of them, the non intentional claims, and there would be no immunity for any intentional claims.

So the Court will, and with regard to the state constitutional claim, whether that's viable or not is simply not —that's the only remaining cause of action, and the state cause of action is not proper for this Court to retain jurisdiction.

The Court will dismiss the complaint in its entirety, leaving the plaintiff to pursue any administrative remedies that she might have under the Federal Tort Claims Act, and so the matter will be dismissed. All right.

Anything further? Thank you, counsel.

We'll take a brief recess.

(PROCEEDINGS ADJOURNED)

APPENDIX G

Letter Denying Plaintiff's Letter Requesting Permission to Take Depositions in Connection with the Pending Motion for Reconsideration

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UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND

October 9, 1996

Harry C. Storm, Esquire
Abrams, West & Storm, P.C.
4550 Montgomery Avenue
Suite 760-N
Bethesda, Maryland 20814

George L. Russell, III, Esquire
Office of the U.S. Attorney
101 West Lombard Street
604 U.S. Courthouse
Baltimore, Maryland 21201

Re: Dachman v. Schwieterman
Civil No. PJM 96-1261

Dear Counsel:

I have before me Mr. Storm's letter of September 9 requesting permission to take depositions in connection with the pending Motion for Reconsideration in the captioned case. I also have Mr. Russell's response.

My decision is to DENY Mr. Storm's request.

Despite the informal nature of this ruling, it shall constitute an Order of Court, and the Clerk is directed to docket it accordingly.

Sincerely,

/s/ Peter J. Messitte
- PETER J. MESSITTE
Judge

PJM: ras

APPENDIX H

Affidavit of Saul J. Singer

DISTRICT OF COLUMBIA:

SAUL J. SINGER, being duly sworn, deposes and says:

1. I am an attorney admitted to the practice of law before the bars of Maryland and the District of Columbia, and am an associate with Ginsburg, Feldman and Bress, Chartered. I was counsel for Defendant Dr. Rebecca Dachman in *State of Maryland v. Dachman*, Case No. 1D00000204 in the District Court of Maryland for Montgomery County. I make this affidavit with full knowledge of the matters described herein, which are true and correct.

2. Dr. Dachman initially called me on August 26, 1994 to discuss her case. I first phoned Sam Dratty, Esquire, Montgomery County Assistant State's Attorney, in early September. Mr. Dratty represented that the State had not yet obtained "the tape;" *i.e.*, the tape of an alleged threat made by my client against Dr. Schweiterman. We set up a meeting for September 14, 1994, at which time Mr. Dratty agreed to turn over the tape and to product whatever other evidence the State had in this matter. At our September 14th meeting, however, Mr. Dratty apologized that he had not yet been able to secure the tape.

3. Mr. Dratty thereafter agreed to secure the tape and product a copy to us as soon as posible. I filed and served a formal First Request For Discovery And Inspection on October 3, 1994.

4. Though Dr. Dachman had yet to secure the tape, discussions with the State commenced. Mr. Dratty's first

suggestion was that he would "stet" the case against Dr. Dachman if, as per complainant Dr. Schweiterman's request, she would agree to submit to psychological counseling. After discussing the matter with Dr. Dachman, I informed Mr. Dratty that my client did not need counseling and would not agree to a stet under such conditions.

5. Mr. Dratty next proposed that, pursuant to Dr. Schweiterman's suggestion, the State would stet the case if Dr. Dachman agreed to "informal," off-the-record counselling. There was no reason to agree to succumb to Dr. Schweiterman's blatant attempt to characterize Dr. Dachman as the person with a "problem" in this matter and I informed Mr. Dratty that Dr. Dachman was not going to agree to go for unneeded counselling.

6. Next, the State proposed that, if Dr. Dachman so agreed, if there were no further "incidents" between Drs. Dachman and Schweiterman for one year, and if Dr. Dachman "agreed to have only work-related conversations with Dr. Schweiterman," the State would stet the case. We refused to settle case on any arbitrary "conditions" set by Dr. Schweiterman and the State, insisting that we could not entertain the imposition of *any* conditions upon Dr. Dachman, who is entirely innocent of the charges against her.

7. Subsequently, on October 13, 1994, *one month after* my face-to-face meeting with Mr. Dratty and with trial scheduled to commence *in one week* (on October 21, 1994), the State had yet to turn over to us *any* evidence in this case, including the key tape recording of the alleged telephone threat. Though Dr. Dachman very much wanted to proceed to trial and have the opportunity to face her accuser and demonstrate her innocence of the charges, I was forced to move for a continuance, which the State did not oppose and the Court granted. The tape did not arrive until a week later, on October 20, 1994.

8. With the trial rescheduled for November 22, 1994, the case was taken over by Montgomery County Assistant

State's Attorney David Baker. During one of our initial phone conversations, Mr. Baker raised again the issue of a stet if Dr. Dachman would attend counselling, which I flatly rejected. In a later discussion, Mr. Baker stated that, having read the charging document and the statute, he wasn't even certain that the charging document stated properly a charge against Dr. Dachman or met the requirements of the law.

9. On November 21, 1994 late in the afternoon, Mr. Baker called me to say that he was going to request a continuation of the case in order to have the time to discus a *nolle prosse* with Dr. Schweiterman. He stated that the trial date would be delayed only one week but, when I appeared at the continuance hearing the next morning, trial was set for one month later, December 20, 1994.

10. Finally, when I called the State on the afternoon of December 19, 1994, I was informed that the State would *nolle* the case.

FURTHER AFFIANT SAYETH NOT.

/s/ Saul J. Singer
SAUL J. SINGER

[Notarization Omitted]

APPENDIX I

FDA Ethics Guide § 73.725.1301 Responsibility for Reporting Possible Criminal Violations

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FDA ETHICS GUIDE

Subpart M—Reporting Violations

§ 73.725-1301 Responsibility for reporting possible criminal violations.

An employee who has information which he or she reasonably believes indicates a possible offense against the United States by an employee of the Department or any *other individual working on behalf of the Department,* shall immediately report such information to his or her supervisor, any management official, or directly to the Office of the Inspector General. Offenses covered by the preceding sentence include, but are not limited to, bribery, fraud, perjury, conflict of interest, misuse of funds, equipment, or facilities, and other conduct by a government officer or employee, grantee, contractor or other person which is prohibited by title 18 of the United States Code. Employees and supervisors should refer to chapter 5-10 of the Department's General Administration Manual for procedures regarding the reporting and handling of such information.

§ 73.735-1302 Responsibility for reporting allegations of misconduct.

An employee who has information which he or she reasonably believes indicates the existence of any activity constituting (1) a possible violation of a rule or regulation of the Department or (2) mismanagement, a gross waste of funds, or abuse of authority; or (3) a substantial and specific danger to the public health and safety,

shall immediately report such informaton to his or her supervisor, any management official of the Department, or directly to the Office of the Inspector General. Employees and supervisors should refer to chapter 5-10 of the Department's General Administration Manual for procedures regarding the reporting and handling of such information. This subsection does not cover employee grievances, equal employment opportunity complaints, clasification appeals, or other matters for which a formal government-wide review system has been established by the Federal government.

§ 73.735-1303 Prohibition of reprisals.

(a) Any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority, take or threaten to take any action against any employee as a reprisal for making a complaint or providing any information pursuant to § 73.735-1301 and 1302. If the complaint was made or the information was disclosed with the knowledge that it was false, or with willful disregard of employees based on those reasons would not constitute a reprisal action.

(b) An employee who believes that he or she has been threatened with a personnel action, any other action, or its truth or falsity, any personnel action taken against the harasment or has been harmed by any action as a reprisal for having made a complaint or providing information pursuant to § 73.735-1301 or 1302 may request the Office of the Inspector General to review his or her allegations. Whenever the Inspector General has reason to believe that the allegations may be true, he or she will refer the matter to the Assistant Secretary for Personnel Administration for appropriate action. The Assistant Secretary for Personnel Administration may order a stay of any personnel action if he or she determines that there are reasonable grounds to velieve that the personnel ac-

tion is being taken as a reprisal for making a complaint or providing information pursuant to § 73.735-1301 or 1302.

§ 73.735-1304 Referral of matters arising under the standards of this part.

(a) The Department of Ethics Counselor may refer to the Inspector General for investigation and/or further action any matter arising under the standards of this Part.

(b) The Department of Ethics Counseler may refer to the Office of Government Ethics, or the Inspector General may refer to the Department of Justice, suspected violations of the criminal laws regarding employee standards of conduct and conflicts of interest.

APPENDIX J

FDA Staff Manual Guide § 1216.6 organization of Center for Biologics Evaluation and Research—Division of Clinical Trial Design and Analysis

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STAFF MANUAL GUIDE
FOOD AND DRUG ADMINISTRATION
ORGANIZATION AND DELEGATIONS MANUAL

GUIDE FDA 1216.6

ORGANIZATION—CENTER FOR BIOLOGICS EVALUATION AND RESEARCH

OFFICE OF THERAPEUTICS RESEARCH AND REVIEW

DIVISION OF CLINICAL TRIAL DESIGN AND ANALYSIS

1. Division of Clinical Trial Design and Analysis
2. Authority and Effective Date

1. *DIVISION OF CLINICAL TRIAL DESIGN AND ANALYSIS* (HFBKE).

   a. Develops and maintains the Office's Clinical Review Program.

   b. Evaluates for safety and efficacy pharmacologic, toxologic, and clinical data submitted in support of product license applications (PLAs) and preclinical and clinical data submitted in support of amendments to PLAs. Decides on the adequacy of preclinical data and clinical trials design and data. submitted to support licensure and to support approval of amendments.

   c. Evaluates for safety and efficacy preclinical and clinical data submited in support of investigational new drug applications (INDs).

d. Develops Center and Office policies and procedures applicable to the review of preclinical and clinical trial design and data submited in INDs and in support of PLAs and PLA amendments.

e. Performs consultative reviews of preclinical and clinical trials and data in PLAs, PLA amendmendments, and INDs in response to requests from other Center components.

f. Assigns, coordinates, and supervises clinical review work performed by members of other divisions within the Office participating in the Clinical Review Program and performed by staff as part of the Joint FDA Oncology Program.

g. Trains Center reviewers in clinical trial design and analysis.

h. Assesses consultative clinical reviews of biological products performed by other Centers for consistency with CBER policies and practices.

i. Serves as the Center resource for evaluation of clinical data obtained through CBER inspections and bioresearch monitoring program.

2. *AUTHORITY AND EFFECTIVE DATE.* The functional statements for the Division were approved by the Associate Commissioner for Management on November 30, 1992.

APPENDIX K

FDA Staff Manual Guide-Organization Office of the Commissioner-Office of Criminal Investigations

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STAFF MANUAL GUIDE
FOOD AND DRUG ADMINISTRATION
ORGANIZATION AND DELEGATIONS MANUAL

GUIDE FDA 1121 40

ORGANIZATION-OFFICE OF THE COMMISSIONER

OFFICE OF REGULATORY AFFAIRS

OFFICE OF CRIMINAL INVESTIGATIONS

1. Office of Criminal Investigations
2. Area Offices
3. Authority and Effective Date

1. *OFFICE OF CRIMINAL INVESTIGATIONS* (HF4AD).

   a. Advises and assists the Associate Commissioner and other key officials on regulations and criminal matters that affect the Agency.

   b. Directs, plans, and develops criminal investigation activities in coordination with other Agency compounds and with other Federal, State, and local law enforcement agencies.

   c. Develops, coordinates, and implements Agency policy related to criminal investigations.

   d. Initiates and conducts criminal investigations under all statutes administered by the Food and Drug Administration, through area offices located throughout the United States; coordinates assign-

ments involving undercover and surveillance personnel and activities.

e. Assures coordination of criminal investigation activities with FDA Regional Field Offices and District Offices and adherence to Agency's enforcement priorities; develops and maintains cooperative relationships with field and Headquarters components.

f. Provides recommendations to the Office of General Counsel on referrals of criminal cases to the Department of Justice for further investigation and/or prosecution, or directly to the U.S. Attorney when such direct reference is authorized.

g. Develops automated data processing systems to be used for criminal investigations and related enforcement matters.

h. Develops, reviews, and approves training programs for FDA's criminal investigators and related personnel.

i. Participates in Grand Jury investigations and serves as agents of the Grand Jury.

2. *AREA OFFICES* (HFA4DN, HFA4DA, HFA4DS, HFA4DM, HFA4DW, HFA4DP).

a. Initiates, directs, plans, develops, and conducts criminal investigations activities under all statutes enforced by the Food and Drug Administration

b. Assures coordination of criminal investigative activities with FDA's Regional Field Offices, District Offices, and other Agency units as appropriate, including the need for participation of FDA District Office personnel in criminal investigative activities. Maintains cooperative relationships with field and headquarters components

c. Coordinates and maintains liaison on criminal investigative activities with other Federal, State, and local law enforcement agencies as appropriate

d. Evaluates findings of a criminal investigation and determines appropriate follow up. Provides recommendations, in coordination with Office of Criminal Investigations, on referrals of criminal cases to the Department of Justice or the responsible U.S. Attorney for litigation. Assists in implementing approved actions.

e. Coordinates and implements Agency policy related to criminal investigations.

f. Provides investigational support to Headquarters components and across Area Office boundaries as needed.

g. Provides counsel and training regarding criminal investigative techniques, equipment, safety, and security to Agency personnel.

h. Participates in Grand Jury investigations and serves as agents of the Grand Jury.

i. Manages resource allocations, money, and people, and evaluates use of resources to assure program accomplishments. Advises the Director, Office of Criminal Investigations, on new or emerging problems and trends, program needs and priorities, manpower, equipment, financial needs, and FDA's long-range planning in the criminal investigative area.

j. Manages the Area Office data information system.

3. *AUTHORITY AND EFFECTIVE DATE.*

a. *Office Level.* The functional statements for this Office were approved by the Commissioner of Food and Drugs effective December 15, 1991 and

published in the Federal Register (56 FR 67076) on December 27, 1991.

b. *Area Office Level.* The functional statements for the Area Offices in this Office were approved by the Associate Commissioner for Management on October 28, 1991.

APPENDIX L

FDA Staff Manual Guide-Division of Management Services-Physical Security Reports of Loss, Theft, Vandalism, or Suspicious Actions within Headquarters

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STAFF MANUAL GUIDE
FOOD AND DRUG ADMINISTRATION

FDA h:2280.5

DIVISION OF MANAGEMENT SERVICES—
PHYSICAL SECURITY

REPORTS OF LOSS, THEFT, VANDALSM OR SUSPICIOUS ACTIONS WITHIN HEADQUARTERS ACTIVITIES

1. Purpose
2. Policy
3. Limitations
4. Definitions
5. Responsibilities

Attachment A—GSA Form 3155—
Offense/Incident Report

1. *PURPOSE.* To establish uniform procedures and provide guidance for reporting losses, theft, acts of vandalism, or suspicious actions within Headquarters activities.

2. *POLICY.* All losses or thefts of (Personal) Government property, all acts of vandalism, and all suspicious actions should be reported as soon as possible.

3. LIMITATIONS. Nothing contained herein will alter or change requirements established in Staff Manual Guide FDA 2620.2—Accounting and Inventory Controls for Property Assigned to Custodial Areas.

4. *DEFINITIONS.*

   a. *Personal Property.* Government property of any kind or interest therein, except real property and records of the Federal Government. For the purpose of clarity in this staff manual guide, "Personal Property" will be referred to as "Government Property."

   b. *Private Property.* Any item(s), belonging to an employee or visitor, which would include wallets, purses, wall hangings, plants, etc. This *does not* include accountable government property assigned to an employee.

5. *RESPONSIBILITIES.*

   a. *All Employees:*

      (1) For purposes of security, regard your workspace and office suite as your "home" and note any strange or suspicious persons or incidents taking place.

      (2) If you see an unknown individual in your office area, ask what their business is and whom they are there to see. If they are picking up government materials for which the agency is responsible, ask them to verify their identity and need for the material. If government property is being taken out of the building for repair, ensure that an OF-7 (Property Pass) has been issued and signed by an authorized FDA employee.

(3) If in doubt as to the need or nature of a person's presence in the area or of the actions taking place, immediately report the situation to your supervisor. IF IT IS AN EMERGENCY (CRIME IN PROGRESS), SUMMON THE GUARD FORCE OR LOCAL LAW ENFORCEMENT AGENCIES. *DO NOT ATTEMPT TO USE PHYSICAL FORCE ON ANY SUSPECT.*

(4) When reporting an incident to the guard force or local law enforcement agency, please note distinguishing features of the person about whom you are suspicious, such as: height, mustache, complexion, hair color and style, facial hair (beard, mustache), eyes (glasses, color), clothing (color of shirt, pants, dress, fabric, style), shoes (style, color), and other distinguishing marks or articles (body scars, tattoos, jewelry).

(5) If applicable, note color, type and make of vehicle, being used by a suspect and license number, if obtainable.

(6) Threatening phone calls, i.e. (bomb threats or acts of violence) should be reported to your supervisor and to the guard force or local law enforcement agency *IMMEDIATELY*. A log should be kept of all calls received. Try to distinguish voice patterns, background noises, etc., establish date and time that call(s) is received.

(7) Notify your supervisor immediately upon discovering a loss or theft. If assistance is required to determine serial numbers, property description, or purchase order information for

government property, contact the Personnel Property Management Section, HFA-225.

(8) Attachment A, GSA Form 3155 (Offense/Incident Report) will be completed by guard or GSA Federal Protective Service, where applicable, for any loss or theft of government property. Cooperate with law enforcement authorities investigating the incident.

(9) Use the following measures to deter thefts and losses:

(a) Do not leave wallets, change-purses, pocketbooks, or other personal valuables unattended at *any* time. If you must leave your office area, lock the item in a desk or file cabinet.

(b) Wardrobes or other receptacles for coats or other items of clothing should not be located near a corridor door.

(c) Do not leave coins or stamps in an unlocked desk drawer.

(d) Coffee funds or monies collected for in-house gifts, luncheons, etc., should be controlled by one individual and locked in a secured container *at all times.* Keys to the secured container should not be left in an unlocked desk or cabinet.

(e) Easily portable government property which has been assigned to an employee also requires protection from theft. Items such as hand-held calculators, dictating machines, tape recorders, cameras, etc., should *always* be secured in a locked desk or file cabinet when not in use.

where pilferable items cannot be secured in a locked container, secure the area.

(f) The combination locks on FDA corridor and some interior doors are provided for employees protection and protection of government property. They should be fully utilized. Do not leave office areas unattended and corridor doors unlocked. Door combinations should be kept in a wallet or purse, not in an unlocked desk or in a rolodex file on top of a desk.

If an employee is going to work weekends or during security hours, it is that individual's responsibility to know the combination before entering the space.

(b) *Supervisors:*

(1) Shall inform all employees who are working with government property, privacy record systems, and documents containing trade secret or privileged information, of their obligation to protect such materials and of the methods to be used to provide adequate protection.

(2) Stress to employees the need for cooperation with law enforcement authorities.

(3) Ensure that employee has contacted the Personal Property Management Section, HFA-225, when a loss or theft of government property has occurred.

(4) Implement such actions as may be deemed necessary by the FDA Physical Security Staff in order to protect evidence at the scene of an incident.

6. *EMERGENCY OR SECURITY/LAW ENFORCEMENT TELEPHONE NUMBERS.*

a. *Designated Contacts:*

(1) In the event that the guard force or local law enforcement agencies are requested, the following locations and emergency numbers are being provided:

• *PARKLAWN FACILITIES*	*CONTACT*
Parklawn Building	Parklawn Security Central 443-4144
Park Building	Parklawn Security Central 443-4144
Chapman Building	Parklawn Security Central 443-4144
Twinbrook Complex	Parklawn Security Central 443-4144
CDRH Laboratory	Parklawn Security Central 443-4144
Metro Park North	Parklawn Security Central 443-4144
PCC Tape Storage Vault	Parklawn Security Central 443-4144

• *SILVER SPRING*		
Silver Spring Plaza	#1. FDA Guard Office	427-7923
	#2. Montgomery Co. Police	(911)

• *BELTSVILLE*		
Agriculture Research Center	Agriculture Police	344-2167
Beltsville Research Facility	U.S. Park Police	34-4250

• *SOUTH WEST COMPLEX—D.C.*		
Federal Building 8 (FB8)	#2. HHS Guard	245-1026
	#1. GSA Control Center	472-1111
Mary E. Switzer	GSA Control Center	472-1111

• *NATIONAL INSTITUTE OF HEALTH*		
Bldgs. #29/29A/14	NIH Guard Office	496-5685

APPENDIX M

Standing Order Concerning Removal in Case Assigned to Judge Messitte

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

4/29/96

RE: Dachman v. Schwieterman
PJM-96-1261

STANDING ORDER
CONCERNING REMOVAL IN CASE
ASSIGNED TO JUDGE MESSITTE

IT IS HEREBY ORDERED that all parties removing actions to this Court shall, no later than fifteen (15) days after filing a removal, file and serve a signed Statement under the case and caption that sets forth the following information:

1) The date(s) on which defendant(s) or their represenative(s) first received a copy of the summons and complaint in the removed state court action.

2) The date(s) on which each defendant was served with a copy of the summons and complaint, if any of those dates are different from the date(s) set forth in item number 1.

3) In actions predicated on diversity jurisdiction, an indication of whether any defendants who have been served are ciizens of the state in which this Court sits.

4) If removal takes place more than thirty (30) days after any defendant first received a copy of the summons and complaint, the reasons why removal has taken place

at this time and the date on which the defendant(s) first received a paper identifying the basis for such removal.

5) In actions removed to this Court in which the action in state court was commenced more than one year before the date of removal, the reasons why this action should not be summarily be remanded to state court.

6) Identification of any defendant who was served in the state court action prior to the time of removal who did not formally join in the notice of removal and the reasons why such defendant did not join.

IT IS FURTHER ORDERED that all defendants to the action who joined in the notice of removal shall file such Statement within the time period set forth herein, although the parties may file a joint statement so long as such Statement is signed by counsel for each party.

IT IS FURTHER ORDERED that the removing defendant(s) shall serve a copy of this Order on all other parties to the action no later than the time they file and serve a copy of the Statement required by this Order. Any party who learns at any time that any information provided in the Statement(s) filed pursuant to this Order is incorrect shall immediately notify the Court in writing to said effect.

IT IS SO ORDERED.

/s/ P. J. Messitte
PETER J. MESSITTE
United States District Judge

APPENDIX N

Certification of Scope of Employment

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil Case No.: ———

S. REBECCA DACHMAN,
Plaintiff

v.

WILLIAM D. SCHWIETERMAN,
Defendant/Petitioner

CERTIFICATION

The undersigned, United States Attorney for the District of Maryland, pursuant to 28 U.S.C. Section 2679, and by virtue of the authority vested in her by the Attorney General under Order 254-61, 26 F.R. 11420, hereby certifies that she has read the foregoing Petition for Removal and the attachments thereto, and that upon the basis of the information now available to her with respect to the incident referred to therein, she is of the opinion that the Petitioner, William David Schwieterman was acting within the scope of his employment as an employee of the United States at the time of such incident.

Dated: April 22, 1996

/s/ Lynne A. Battaglia
LYNNE A. BATTAGLIA
United States Attorney
604 United States Courthouse
101 West Lombard Street
Baltimore, Maryland 21201-2692
410/962-4822

APPENDIX O

Statement of Charges

DISTRICT COURT OF MARYLAND
FOR MONTGOMERY COUNTY
Located at 27 Courthouse Square
Rockville, Maryland 20850

Case No. 1D00000204

STATE OF MARYLAND
COMPLAINANT
SCHWIETERMAN, WILLIAM DAVID
9501 Hollins Court
Bethesda, MD 20817

VS

DACHMAN, REBECCA
1451 Rockville Pike
Rockville, MD 20852

STATEMENT OF CHARGES

UPON THE FACTS CONTAINED IN THE APPLICATION OF SCHWIETERMAN, WILLIAM DAVID IT IS FORMALLY CHARGED THAT DACHMAN, REBECCA at the dates, times, and locations specified below:

DESCRIPTION OF CHARGE
TELEPHONE THREATS

On or About 07/15/94 at 01:15 PM 1451 Rockville Pike; Rockville Montgomery County, Maryland

Did use telephone faclities to threaten physical harm towards William David Schwieterman.

Against the Peace, Government, and Dignity of the State.

Judicial Officer: /s/ B. Weller

APPENDIX P

Selected Page from Transcript of the Oral Arguments Before the Court of Appeals

* * * *

[39] JUDGE MOTZ: Mr. Zelinger, I have the Statement of Charges in front of me at JA53. Maybe you can tell me as we're sitting here where these pack of lies are.

MR. ZELINGER: Sure.

JUDGE MOTZ: Is that the document, for example, assert that she didn't punch her hand through a bathroom wall on November 18th?

MR. ZELINGER: That's correct, Your Honor. She asserts that she did not punch her hand through a wall, and she asserts that Dr. Schwieterman knew at the time he filed these statements that she did not punch her hand through a wall. And she—

JUDGE MOTZ: And she asserts that she wasn't escorted from Dr. Schwieterman's office by a security guard?

MR. ZELINGER: She asserts that she was asked by a security guard to leave the premises, which she did at that point. There was no touching. There was no physical removal.

* * * *

APPENDIX Q

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

CONSTITUTIONAL PROVISIONS

AMENDMENT IV—SEARCHES AND SEIZURES

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT V—GRAND JURY INDICTMENT FOR CAPITAL CRIMES; DOUBLE JEOPARDY; SELF-INCRIMINATION; DUE PROCESS OF LAW; JUST COMPENSATION FOR PROPERTY

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATUTORY PROVISIONS

Title 18 U.S.C.S. § 1001 provides as follows:

§ 1001. Statements or entries generally

Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false,

fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

Statutes 28 USCS § 1346, 1442, 1446, and 2679

§ 1346. United States as defendant

(a) The district courts shall have original jurisdiction, concurrent with the United States Claims Court, of:

(1)(Any civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority of any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws;

(2) Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort, except that the district courts shall not have jurisdiction of any civil action or claim against the United States founded upon any express or implied contract with the United States or for liquidated or unliquidated damages in cases not sounding in tort which are subject to sections 8(g)(1) and 10(a)(1) of the Contract Disputes Act of 1978 [41 USCS §§ 607(g)(1), 609(a)(1)]. For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States.

(b) Subject to the provisions of chapter 171 of this title [28 USCS §§ 2671 et seq.], the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accuring on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

(c) The jurisdiction conferred by this section includes jurisdiction of any set-off, counterclam, or other claim or demand whatever on the part of the United States any plaintiff commencing an action under this section.

(d) The district courts shall not have jurisdiction under this section of any civil action or claim for a pension.

(e) The district courts shall have original jurisdiction of any civil action against the United States provided in section 6226, 6228(a), 7426, or 7428 (in the case of the United States district court for the District of Columbia) or section 7429 of the Internal Revenue Code of 1954 [26 USCS §§ 6226, 6228(a), 7426, 7428, 7429].

(f) The district courts shall have exclusive original jurisdiction of civil actions under section 2409a [28 USCS § 2409a] to quiet title to an estate or interest in real property in which an interest is claimed by the United States.

§ 1442. Federal officers sued or prosecuted

(a) A civil action or criminal prosecution commenced in a State court against any of the following persons may be removed by them to the district court of the United States

for the district and division embracing the place wherein it is pending:

(1) Any officer of the United States or any agency thereof, or person acting under him, for any act under color of such office or on account of any right, title or authority claimed under any Act of Congress for the apprehension or punishment of criminals or the collection of the revenue.

(2) A property holder whose title is derived from any such officer, where such action or prosecution affects the validity of any law of the United States.

(3) Any officer of the courts of the United States, for any Act under color of office or in the performance of his duties;

(4) Any officer of either House of Congress, for any act in the discharge of his official duty under an order of such House.

(b) A personal action commenced in any State court by an alien against any citizen of a State who is, or at the time the alleged action accrued was, a civil officer of the United States and is a nonresident of such State, wherein jurisdiction is obtained by the State court by personal service of process, may be removed by the defendant to the district court of the United States for the district and division in which the defendant was served with process.

§ 1446. Procedure for removal

(a) A defendant or defendants desiring to remove any civil action or criminal prosecution from a State court shall file in the district court of the United States for the district and division within which such action is pending a notice of removal signed pursuant to Rule 11 of the Federal Rules of Civil Procedure and containing a short and plain statement of the grounds for removal, together with a copy of all process, pleadings, and orders served upon such defendant or defendants in such action.

(b) The notice of removal of a civil action or proceeding shall be filed within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within thirty days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter.

If the case stated by the initial pleading is not removable, a notice of removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable, except that a case may not be removed on the basis of jurisdiction conferred by section 1332 of this title moe than 1 year after commencement of the action.

(c)(1) A petition for removal of a criminal prosecution shall be filed not later than thirty days after the arraignment in the State court, or at any time before trial, whichever is earlier, except that for good cause shown the United States district court may enter an order granting the petitioner leave to file the petition at a later time.

(2) A petition for removal of a criminal prosecution shall include all grounds for such removal. A failure to state grounds which exist at the time of the filing of the petition shall constitute a waiver of such grounds, and a second petiion may be filed only on grounds not existing at the time of the original petition. For good cause shown, the United States district court may grant relief from the limitations of this paragraph.

(3) The filing of a petition for removal of a criminal prosecution shall not prevent the State court in

which such prosecution is pending from proceeding further, except that a judgment of conviction shall not be entered unless the petition is first denied.

(4) The United States district court to which such petition is directed shall examine the petition promptly. If it clearly appears on the face of the petition and any exhibits annexed thereto that the petition for removal should not be granted, the court shall make an order for its summary dismissal.

(5) If the United States district court does not order the summary dismissal of such petition, it shall order an evidentiary hearing to be held promptly and after such hearing shall make such disposition of the petition as justice shall require. If the United States district court determines that such petition shall be granted, it shall so notify the State court in which prosecution is pending, which shall proceed no further.

(d) Promptly after the filing of such petition for the removal of a civil action and bond the defendant or defendants shall give written notice thereof to all adverse parties and shall file a copy of the petition with the clerk of such State court, which shall effect the removal and the State court shall proceed no further unless and until the case is remanded.

(e) If the defendant or defendants are in actual custody on process issued by the State court, the district court shall issue its writ of habeas corpus, and the marshal shall thereupon take such defendant or defendants into his custody and deliver a copy of the writ to the clerk of such State court.

§ 2679. Exclusiveness of remedy

(a) The authority of any federal agency to sue and be sued in its own name shall not be construed to authorize suits against such federal agency on claims which are cog-

nizable under section 1346(b) of this title, and the remedies provided by this title in such cases shall be exclusive.

(b)(1) The remedy against the United States provided by sections 1346(b) and 2672 of this title for injury or loss of property, or personal injury or death arising or resulting from the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment is exclusive of any other civil action or proceeding for money damages by reason of the same subject matter against the employee whose act or ommission gave rise to the claim or against the estate of such employee. Any other civil action or proceeding for money damages arising out of or relating to the same subject matter against the employee or the employee's estate is precluded without regard to when the act or omission occurred.

(2) Paragraph (1) does not extend or apply to a employee of the Government—

(A) which is brought for a violation of the Constitution of the United States, or

(B) which is brought for a violation of a statute of the United States under which such action against an individual is otherwise authoized.

(c) The Attorney General shall defend any civil action or proceeding brought in any court against any employee of the Government or his estate for any such damage or injury. The employee against whom such civil action or proceeding is brought shall deliver within such time after date of service or knowledge of service as determined by the Attorney General, all process served upon him or an attested true copy thereof to his immediate superior or to whomever was designated by the head of his department to receive such papers and such person shall promptly furnish copies of the pleadings and process therein to the United States attorney for the district embracing the place

wherein the proceeding is brought, to the Attorney General, and to the head of his employing Federal agency.

(d)(1) Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a United States district court shall be deemed an action against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant.

(2) Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a State court shall be removed without bond at any time before trial by the Attorney General to the district court of the United States for the district and division embracing the place in which the action or proceeding is pending. Such action or proceeding shall be deemed to be an action or proceeding brought against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant. This certification of the Attorney General shall conclusively establish scope of office or employment for purposes of removal.

(3) In the event that the Attorney General has refused to certify scope of office or employment under this section, the employee may at any time before trial petition the court to find and certify that the employee was acting within the scope of his office or employment. Upon such certification by the court, such action or proceeding shall be deemed to be an action or proceeding brought against the United States

under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant. A copy of the petition shall be served upon the United States in accordance with the provisions of Rule 4(d)(4) of the Federal Rules of Civil Procedure. In the event the petition is filed in a civil action or proceeding pending in a State court, the action or proceeding may be removed without bond by the Attorney General to the district court of the United States for the district and division embracing the place in which it is pending. If, in considering the petition, the district court determines that the employee was not acting within the scope of his office or employment, the action or proceeding shall be remanded to the State court.

(4) Upon certification, any action or proceeding subject to paragraph (1), (2), or (3) shall proceed in the same manner as any action against the United States filed pursuant to section 1346(b) of this title and shall be subject to the limitations and exceptions applicable to those actions.

(5) Whenever an action or proceeding in which the United States is substituted as the party defendant under this subsection is dismissed for failure first to present a claim pursuant to section 2675(a) of this title, such a claim shall be deemed to be timely presented under section 2401(b) of this title if—

(A) the claim would have been timely had it been filed on the date underlying the civil action was commenced, and

(B) the claim is presented to the appropriate Federal agency within 60 days after the dismissal of the civil action.

(e) The Attorney General may compromise or settle any claim asserted in such civil action or proceeding in the manner provided in section 2677, and with the same effect.

§ 2680. Exceptions

The provisions of this chapter [28 USCS §§ 2671 et seq.] and section 1346(b) of this title shall not apply to—

* * * *

(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights: Provided, That, with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter [28 USCS §§ 2671 et seq.] and section 1346(b) of this title shall apply to any claim arising, on or after the date of the enactment of this proviso [enacted March 16, 1974], our of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. For the purposes of this subsection, "investigative or law enforcement officer" means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law.

* * * *

APPENDIX R

IRS Standards

* * * *

[A]n Assault investigation upon receiving a report of an assault, threat, or forcible interference against Service employees in the performance of their duties. Follow these procedures:

1. Interview the assaulted or threatened employee as soon as possible after the incident is reported to Internal Security.

2. Interview witnesses as soon as possible.

3. Obtain a complete criminal history of the subject.

4. Research Inspection indices, the Potentially Dangerous Taxpayer (PDT) database and other Service records (Examination, Collection, and Criminal Investigation) for information on the subject. Ensure that no other employees contact the subject.

5. Complete Form 8273, Assault, Threat, Harassment Incident Report, and send it to the National Employee Protection Coordinator (NEPC) via electronic mail.

6. Advise the District or Service Center Director of the assault, threat, or incident, so that the Director can make an initial PDT determination.

7. Obtain a prosecutive opinion from the U.S. Attorney.

8. Proceed with the investigation as directed by the U.S. Attorney.

9. If the U.S. Attorney declines prosecution, obtain the U.S. Attorney's concurrence to interview the subject.

10. Advise the assaulted or threatened employee of the final results of the investigation.

11. Complete Form 8273 and obtain a final PDT determination.

NOTE:

If the Service employee completes a Form 4652, Assault, Threat of Assault, or Harassment Report, include it in the final report.